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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DENNIS BURGIN and ADAM  
WEICK,

Defendants and Appellants.

G046982

(Consol. with G047004)

(Super. Ct. No. 09ZF0073)

O P I N I O N

Appeals from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Susan K. Shaler for Defendant and Appellant Michael Dennis Burgin.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant Adam Weick.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Warren Williams, Deputy Attorneys General, for Plaintiff and Respondent.

The jury convicted defendants Michael Dennis Burgin and Adam Weick of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)), second degree commercial burglary (Pen. Code, §§ 459, 460, subd. (b)), and street terrorism (Pen. Code, § 186.22, subd. (a)) in connection with a Tustin jewelry store robbery. The jury also convicted Burgin of the same crimes in connection with a Laguna Beach jewelry store robbery. The jury found defendants committed the robberies and burglaries for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)) and that each defendant personally and vicariously used a weapon during the robberies (Pen. Code, § 12022.53, subds. (b), (e)(1)).

At the sentencing hearing, Burgin admitted he had suffered two prior felony strike convictions (Pen. Code, §§ 667, subds. (d), (e)(2)(A), 1170.12, subds. (b), (c)(2)(A)) and two prior serious felony convictions (Pen. Code, § 667, subd. (a)(1)). Weick admitted he had suffered one prior felony strike conviction (Pen. Code, §§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1)), one prior serious felony conviction (Pen. Code, § 667, subd. (a)(1)), and one prior prison term (Pen. Code, § 667.5, subd. (b)). The court sentenced Burgin to 50 years to life in prison plus a determinate sentence of 40 years. The court sentenced Weick to 21 years in prison.

On appeal, defendants contend the court erred by admitting propensity evidence and failing to instruct on accomplice testimony. As to the instructional error, we agree but conclude the error was harmless. As to the evidentiary claims, we conclude there was no error, with the exception of evidence of Burgin's heroin use, the admission of which was harmless. Accordingly, we affirm the judgment.

## FACTS

### *The Tustin Robbery*

The entrance to Joseph Andraos' jewelry store in Tustin was secured by a metal bar cage where customers waited to be buzzed through the locked front door. On August 4, 2009, a woman arrived at the cage door. She did not look suspicious, so Andraos buzzed the door to let her in. The woman showed Andraos a ring and asked him how much he would pay for it. Andraos offered \$250. The woman asked if she could go outside to phone her mother confidentially. Andraos said, "Fine," and buzzed the door so the woman could open it and leave. The woman opened the door, but held it open.

Suddenly Andraos saw two males with semiautomatic guns running at him. The men wore bandanas over their faces, as well as sunglasses, hats, and gloves. The woman smirked at Andraos and left.

The men came close to Andraos' face, pointed guns at him, and said, "Don't push anything. Keep your hands up." Andraos held his hands up, and did not press the silent alarms.

Both men were chubby, but one was taller than the other. The shorter man had higher cheekbones and his bandana sat lower on his cheeks.

The men made Andraos unlock the display cases with the most expensive jewelry. Each man carried a large, sturdy bag. The taller man pulled the jewelry from the display cases and put it in his bag.

The shorter man took Andraos to a safe in a back room, held a gun to his head, and said Andraos had three seconds to open the safe or he would be shot. After Andraos opened the safe, the man made him kneel down. The man put all the jewelry from the safe, including diamonds, in a bag. He took Andraos' Rolex watch and the cash from his wallet. He forced Andraos at gunpoint into the bathroom, where he taped his mouth, hands and feet with duct tape, and secured him to the toilet.

The men tried to leave the store, but could not open the cage door. One went back to Andraos in the bathroom; Andraos pointed to the buzzer. The man took the buzzer and ran, buzzed the door, threw the buzzer on the floor, and disappeared.

The robbery had lasted from 15 to 20 minutes. Andraos freed himself after about five minutes, pushed the silent alarm, and phoned 911.

Shortly after the robbery, while the events were fresh in Andraos' mind, he positively identified from photographic lineups the high-cheeked man as Weick and the woman who first came in the store as Aida Arroyo. Andraos could not identify the second man because he had been completely covered.

Andraos and his wife later identified some of his stolen jewelry at various jewelry stores near San Diego. Andraos identified as his stolen property some coins found in Burgin's house. A portable GPS navigator found in Burgin's car contained the address for the Tustin jewelry store. Investigation revealed that a hair found on a countertop at the Tustin jewelry store was consistent with a wig, which the police seized from Arroyo.

### *The Laguna Beach Robbery*

Three weeks later, on the evening of August 25, 2009, three Hispanic men entered a Laguna Beach jewelry store through the open front doors. One man pointed a gun at an employee and demanded the key to the display cases. He asked the employee which watches were expensive and whether the store had any Rolex watches. The employee unlocked the cases. Another man took jewelry from the store's safe. The two men put jewelry and watches in a backpack. A third man stood inside near the doors and told the other two to hurry. One asked for a tie to tie up the employee's hands, but the employee's hands were never actually bound. The robbery took about 10 to 15 minutes. The men smashed the employee's cell phone before they left.

Two or three minutes after the men left the store, the employee went out and saw them running to the left. The employee called 911 on the store's phone.

A bystander looking through the store window had seen two Hispanic or Asian men scooping jewelry into a bag. When the men exited the store, he followed them down the street to their white Ford, which was parked in front of a church. He saw a third man come from a different direction and get in the car before it drove away. The bystander phoned 911 and reported the Ford's license plate number.

An officer spotted the Ford traveling on State Route 73. While stopped at a red light, the officer saw the Ford's rear passenger door momentarily open, but no one got out. With the police car's lights and siren activated, the officer pursued the Ford. The Ford drove through a red light and into a parking structure. The Ford's two front doors were open and a man ran from the driver's side. With no one inside, the Ford rolled over a parking stop bumper into some bushes and came to a stop. Inside the Ford were some of the stolen jewelry, two gun holsters (one holding Remington Peters .38 Special ammunition), some zip ties, two bandanas, sunglasses, and wrappers for batting gloves.

Burgin's DNA and fingerprints were found on some of the Ford's contents. So were the fingerprints of Pedro Hernandez and Alonso Lopez.

Three days later, a .357 caliber revolver loaded with Remington Peters .38 Special ammunition was found on State Route 73.

#### *Postarrest Facts*

The police arrested Burgin and searched his apartment. They found two boxes of ammunition (including a box of Remington Peters .38 Special ammunition which was missing about 30 rounds), and two letters to Burgin from incarcerated persons containing gang-related words like "homies" and thanking Burgin for helping people's families out with money.

The police also arrested Hernandez (whose fingerprints had been found in the Ford).

Sylvia Casteneda had reported the Ford stolen. An officer went to Casteneda's home to question her and found in plain view a hotel receipt with Burgin's name on it and an arrival date of August 26, 2009. Surveillance video at that hotel showed Casteneda checking into the hotel with a man on the morning after the robbery.

Investigators learned from Burgin's phone records that he phoned Weick around the time of the Tustin robbery and that Burgin's phone was hitting off of switches near Tustin on the date of the Tustin robbery. Hernandez phoned Burgin shortly before the Laguna Beach robbery. Burgin's phone pinged in Laguna Beach after the robbery and about 30 minutes later in Aliso Viejo, where the abandoned Ford was found.

Burgin had phoned Veronica Kyriakides many times in August 2009. Kyriakides owned a jewelry store in Chula Vista and sometimes bought stolen secondhand jewelry. Around Mother's Day in May 2009, she had bought stolen jewelry from Burgin, Weick, and a person she called "Danger." In late August or early September, she had bought more stolen jewelry from Burgin. In total, she bought stolen jewelry from Burgin seven or eight times. Burgin bought a car from Kyriakides's son and paid for it with jewelry. Kyriakides testified at trial pursuant to a plea agreement.

#### *Hernandez's Testimony on the Charged Crimes and Uncharged Conduct*

At trial, Hernandez testified that he, Burgin, and Lopez (whose fingerprints were also found in the Ford) participated in the Laguna Beach robbery.<sup>1</sup> Hernandez was

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<sup>1</sup> Hernandez was convicted of robbery and gang-related crimes for the Laguna Beach robbery. He subsequently entered into a plea agreement whereby he pleaded guilty to commercial burglary and a gang-related crime in exchange for a six-year sentence and his honest testimony about his gang and his participation in the robberies. Hernandez received use immunity for his testimony in this case, including his testimony about a robbery in Escondido. But he understood his testimony could be used

a former member and respected associate of Vista Home Boys, a gang. Burgin associated with Vista Home Boys. Lopez was one of Vista Home Boys' shot callers, a highly respected member of the gang. Weick was a member of Vista Home Boys. Most Vista Home Boys members use heroin and methamphetamine.

Burgin asked Hernandez to take part in a jewelry store robbery that would make them at least \$10,000. Hernandez recruited Lopez for the robbery. They borrowed the car of Lopez's girlfriend, Casteneda. They brought a backpack with gloves, guns, ammunition, holsters, extra clothing, and zip ties. Burgin chose the jewelry store they would rob. They parked in front of a church and put on long-sleeved shirts, long pants, hats, and baseball gloves. Hernandez and Burgin each had a gun.

Two women were talking outside the jewelry store. Hernandez, Burgin, and Lopez entered the store. Hernandez went to the safe while Burgin asked the jeweler where the most expensive jewelry was and to open the cases. Hernandez loaded jewelry from the safe and the front room display cases into his backpack. Lopez ran back and forth in front of the store windows, yelling, "They're looking at us. Hurry up." Hernandez looked up and saw a couple of people looking at them. He yelled to Burgin, "That's it. Let's go." Because of the sudden change of plans, Lopez did not tie up the store employee.

Hernandez and Burgin went to the car. Burgin jumped in the driver's seat. Hernandez stood outside the open passenger front door. Lopez came running around the corner, yelling. A witness who had followed them stood behind the car and took photos with his cell phone. Burgin yelled, "Shoot, shoot that motherfucker. Shoot him." But Hernandez did not have it inside himself to shoot. He and Lopez got in the car. The car drove off.

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against him by prosecutors in San Diego County.

As they entered the freeway, Hernandez threw out the guns, glasses, gloves, and hat. They heard sirens. Hernandez told Burgin to pull over and let him out. Hernandez jumped out, carrying the backpack containing the jewelry. He found a small tree, dug a little hole, and put the backpack there. After a “home girl” picked Hernandez up, he went back and got the backpack.

Hernandez spent that night at a hotel with Burgin and Castenada. Burgin took the jewelry to Kyriakides to sell it and gave Hernandez \$3,000 as his split.

Hernandez learned that Lopez had been arrested. Hernandez then turned himself in to prevent the police from raiding his family’s home or harassing his family.

Over defense objection, Hernandez testified that he, Burgin, and Wieck participated in an earlier robbery that took place in Escondido around Mother’s Day. Prior to the Escondido robbery, they bought long-sleeved shirts, gloves, and hats, and Hernandez purchased some Remington Peters .38 Special ammunition. The ammunition was for a .357 caliber revolver. The trio wore hooded sweaters to hide their tattoos. Hernandez first went into the store alone to case it for the number of employees, customers, and cameras. Hernandez then acted as a lookout standing in the middle of the parking lot while Burgin and Weick robbed the store. A surveillance photograph taken inside the store showed that Weick carried the .357 caliber revolver. The gun was the same one discovered on State Route 73 after the Laguna Beach robbery. Hernandez believed that two guns were used in the Escondido robbery. The trio sold some of the jewelry to Kyriakides for around \$28,000 and traded some of it to her son for a Range Rover.

Burgin told Hernandez that he (Burgin) had robbed the Tustin jewelry store on August 4, 2009. Over defense objection, Hernandez testified that Burgin said he (Burgin) and Castenada had used drugs in the hotel room while waiting for Lopez to arrive. Hernandez also testified that Burgin was known to use heroin and that heroin use was prevalent among the Vista Home Boys.

### *Uncharged Assault on Arturo Perez*

In a courthouse holding cell, defendants hit another inmate, Arturo Perez, who tried to protect himself. An officer ordered them to get down on the ground and used a chemical agent on them. The officer did *not* observe Perez to have physically instigated the fight. The officer booked into evidence a DVD of the assault. The videotape of the assault was played for the jury.

### *Gang Expert*

A gang expert opined that Burgin was an active participant in Vista Home Boys at the time of the Tustin and Laguna Beach robberies and that Weick was a member and active participant in the gang at the time of the Tustin robbery. Burgin's moniker is Japs. Based on a hypothetical question mirroring the facts in this case, the expert opined the robberies were committed for the benefit of a criminal street gang.

### *Burgin's Defense Case*

Andraos told an officer he was robbed at gunpoint by two Hispanic men.

## DISCUSSION

### *The Court Properly Admitted Evidence of Uncharged Conduct*

Defendants contend the court abused its discretion by admitting evidence of the uncharged Escondido robbery. Burgin contends the court also abused its discretion by admitting evidence of his heroin use and assault on a cell mate in a holding cell. Defendants argue the Escondido robbery was similar to the charged robberies only in generic ways, i.e., that their shared characteristics are common to all jewelry store robberies. They further contend the uncharged conduct was otherwise dissimilar to the

charged offenses and inflammatory. They conclude the court abused its discretion under Evidence Code sections 1101 and 352,<sup>2</sup> and violated their due process rights.

The prosecution sought to introduce evidence of the Escondido robbery to show, inter alia, identity and common plan under subdivision (b) of section 1101. The People argued the three robberies shared a similar design and plan, i.e., “the entry of an open jewelry store near closing time with three individuals involved . . . , with two carrying guns . . . , using bandanas, caps, hoods to conceal facial identity features, holding the employees at gun point while the other robber ransacks the jewelry cases and safes, placing the stolen items in a back pack / back pack sized container before fleeing and the subsequent selling of the stolen merchandise to the very same second hand jewelry dealer for cash.” The People further argued that the three robberies involved Vista Home Boys, and the Laguna Beach and Escondido robberies involved the same .357 caliber revolver.

The prosecution also sought to admit evidence of defendants’ uncharged assault on Perez, to prove consciousness of guilt and active gang participation. The prosecution stated that Perez, a Vista Home Boys member, made statements to the police that implicated defendants in the Tustin robbery as well as establishing Vista Home Boys as a criminal street gang in which defendants actively participate, and that defendants attacked Perez to discourage him from testifying against them.

The court held a hearing outside the jury’s presence on the People’s request. The prosecutor noted that the defense had raised the issue of identity and that the robberies were signature crimes. Defense counsel agreed that identity was a contested issue, but objected on section 352 and due process grounds to admission of the Escondido robbery evidence. Defense counsel argued the three robberies were “generic,” because there are only “so many ways someone can rob a jewelry store.” The court

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<sup>2</sup> All further statutory references are to the Evidence Code unless otherwise stated.

disagreed, observing that there are many different ways to rob a jewelry store. Defense counsel pointed out some distinctions between the robberies: In the Laguna Beach robbery, the robbers' faces were not covered and the victim was not bound; the Tustin robbery took place one hour before closing time and the robbers used a subterfuge to gain entrance. The court asked the prosecutor to find out whether the Escondido store had a secured front entrance; if it did not, this would explain why the robbers used no subterfuge to gain entry. The prosecutor promised an answer shortly.

Burgin's counsel sought to exclude evidence of his client's heroin use. The prosecutor represented he did not intend to introduce such evidence in the People's case-in-chief.

The court ruled evidence of the Escondido robbery was admissible to show identity and *modus operandi*.

As to defendants' assault on Perez, defense counsel argued the evidence lacked the requisite foundation that defendants knew Perez made statements about them to the police. The court expressly weighed section 352 factors before ruling that evidence of the assault on Perez was admissible to show defendants' consciousness of guilt and their attempt to dissuade a witness, but *not* to show gang affiliation.

We review the relevant law. Under section 1101, subdivision (b) (section 1101(b)), evidence of uncharged conduct is admissible if it is relevant to prove certain facts, including identity and plan. The evidence, however, “‘must not contravene other policies limiting admission, such as those contained in . . . section 352.’” (*People v. Balcom* (1994) 7 Cal.4th 414, 426.)

Evidence of prior misconduct is relevant to prove a particular fact under section 1101(b) if it is *similar* to the charged conduct. The *degree* of similarity required (whether in terms of the *number* of shared marks and/or the *uniqueness* of those shared marks) depends on the fact sought to be proved. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*), superseded by statute on another point as stated in *People v. Robertson*

(2012) 208 Cal.App.4th 965, 991; see also *People v. Thornton* (1974) 11 Cal.3d 738, 756 [strength of inference depends on degree of distinctiveness of individual shared marks, as well as the number of minimally distinctive shared marks], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.)

Identity requires the greatest degree of similarity. For uncharged conduct to be relevant to prove identity, the common marks between the charged and uncharged offenses, considered singly or in combination, must ““logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety.”” (*People v. Felix* (1993) 14 Cal.App.4th 997, 1005.) “[T]he uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] ‘The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.’” (*Ewoldt, supra*, 7 Cal.4th at p. 403.)

To establish a common design or plan, a lesser degree of similarity is needed. (*Ewoldt, supra*, 7 Cal.4th at pp. 402-403.) “Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive . . . .” (*Id.* at p. 403.) But when the shared “characteristics combine to suggest a common *modus operandi*, their collective significance may be substantial” enough to logically distinguish the charged conduct “from other crimes of the same general variety,” thus tending “to strongly suggest that defendant was the perpetrator.” (*People v. Miller* (1990) 50 Cal.3d 954, 989; see also *People v. Balcom, supra*, 7 Cal.4th at p. 424 [defendant’s possession of plan “is relevant to prove the defendant employed that plan and committed the charged offense”].)

“On appeal, the trial court’s determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion.” (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)

The court did not abuse its discretion by ruling the Escondido robbery was admissible under section 1101(b) to establish identity and a common plan. The Escondido robbery shared distinctive features with the charged robberies sufficient to suggest that defendants committed the robberies and followed a common plan. Burgin sold the jewelry from all three robberies to the same fence, i.e., Kyriakides. Each robbery involved other Vista Home Boys members or participants, i.e., Hernandez as to the Laguna Beach and Escondido robberies, Lopez as to the Laguna Beach robbery, and Arroyo as to the Tustin robbery. The same .357 caliber revolver was used in the Escondido and Laguna Beach robberies. All the robberies occurred within a few hours of the respective store's closing time. This combination of factors sufficiently distinguished the charged and uncharged offenses from other crimes of the same general variety. (*People v. Miller, supra*, 50 Cal.3d at p. 989.) "[T]he likelihood of a particular group of geographically proximate crimes being unrelated diminishes as those crimes are found to share more and more common characteristics." (*Ibid.*)

Defendants emphasize certain distinctions between the robberies, such as that the Tustin crime involved a female decoy and a duct-taped victim. But the female decoy at the Tustin store was necessary due to the store's secure entry, whereas the Escondido store's entrance was apparently unsecured. Lopez failed to bind the Laguna Beach store employee with zip ties only because of the witnesses outside the window. In all three robberies, a robber pointed a gun at a store employee. Unlike the Tustin robbers who wore bandanas and the Escondido robbers who donned large hoods, the Laguna Beach robbers may have dressed inconspicuously due to the witnesses on the street and outside the store. Although three participants were inside the Laguna Beach store, Lopez acted as a lookout, just as Hernandez acted as a lookout in Escondido and Arroyo might have in Tustin. In any case, all three robberies involved two armed robbers taking the jewelry. Thus, the discrepancies between the robberies can be explained by divergent circumstances; these differences are minor relative to the significance and distinctiveness

of the robberies' commonalities. Moreover, these factors underscore the court's finding that there are many variables possible in jewelry store robberies and that the robberies in question shared distinctive, nongeneric characteristics.

Next, defendants argue evidence of the battery on Perez was irrelevant to the issues of gang participation or consciousness of guilt, because no evidence showed they knew Perez was cooperating with law enforcement. Not so. Evidence presented at trial supported a finding defendants knew of Perez's cooperation with the police. A paralegal with the district attorney's gang unit testified that, during the discovery process, she provided defense counsel with copies of a police report containing Perez's statements and identifications in his interview with Detective James Monsoor. Monsoor, a detective in the gang unit, testified he interviewed Perez on September 9, 2009, that Perez talked about his knowledge of the Laguna Beach robbery (including the participants' identities), and that Monsoor documented Perez's statements in his police report. The assault on Perez occurred almost seven months later, on March 26, 2010.

Finally, any error in admitting evidence of Burgin's heroin use was harmless, given the overwhelming evidence against him. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [no reasonable probability jury would have reached result more favorable to defendant absent the error].)

But we must still determine whether the court abused its discretion under section 352. That statute affords a court the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice . . . ." (§ 352.) In this context, the word "prejudice" is used in the sense of ""of 'prejudging' a person or cause on the basis of extraneous factors."" (*People v. Harris* (1998) 60 Cal.App.4th 727, 737.) The term does *not* connote "the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case.

The stronger the evidence, the more it is “prejudicial.” The “prejudice” referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, “prejudicial” is not synonymous with “damaging.”” (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

“[T]he trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice . . . .” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) “We will not overturn or disturb a trial court’s exercise of its discretion under section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd.” (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

The court did not abuse its discretion under section 352 by admitting evidence of the Escondido robbery. Weick argues the evidence of the Escondido robbery was stronger than that for the Tustin robbery, because his face was visible in an Escondido surveillance photograph. Although there were no photographs of the Tustin robbery, Andraos positively identified Weick. Defendants’ participation in the Tustin robbery, and Burgin’s in the Laguna Beach robbery, were supported by defendants’ cell phone records showing that their locations and exchanged phone calls were consistent with the dates, times, and locations of those robberies. Evidence of the Escondido robbery was less inflammatory than the charged conduct, in that the Tustin and Laguna Beach victims testified to having a gun pointed at them, to being bound and gagged in the Tustin robbery, and to having a cell phone smashed in the Laguna Beach incident. Furthermore, evidence of the Escondido robbery consumed far less time than the evidence of the charged robberies.

The court found the Perez assault was not unduly prejudicial under section 352 because the charged robberies involved guns, whereas the Perez incident was a fist fight. In response to the court’s question, the prosecutor stated the video was “pretty

short”; the court concluded the evidence would not consume too much time. The court manifestly weighed the competing considerations and ruled the probative value of the assault overcame the section 352 objections. There was no abuse of discretion.

Burgin contends the evidence of his heroin use was inflammatory and unduly prejudicial. The contention is waived, however, because Burgin objected at trial on grounds of relevance and hearsay, not section 352. “Generally, reviewing courts will not consider a challenge to the admissibility of evidence absent ““a specific and timely objection in the trial court on the ground sought to be urged on appeal.”” (*People v. Champion* (1995) 9 Cal.4th 879, 918, overruled on another ground in *People v. Combs* (2004) 34 Cal.4th 821, 860.)

Weick contends the gang evidence should have been excluded as unduly prejudicial under section 352. He claims the gang evidence showed a conspiracy by Vista Home Boys to rob jewelry stores in San Diego and Orange Counties. Although trial courts “should carefully scrutinize” gang evidence before admitting it, a trial court may reasonably conclude under section 352 that the probative value of the evidence of gang membership is not substantially outweighed by its prejudicial effect. (*People v. Champion, supra*, 9 Cal.4th at pp. 922-923.) Here, the gang evidence was highly probative given the affiliation of all participants with the Vista Home Boys and the participants’ and the gang’s heroin use. Furthermore, the evidence was necessary to prove the charged substantive gang offenses and enhancements.

Finally, defendants contend the admission into evidence of the uncharged conduct violated their due process rights. But our Supreme Court has upheld the constitutionality of a state statute which permits the admission of propensity evidence while preserving the trial court’s discretion to exclude the evidence under section 352. (*People v. Falsetta* (1999) 21 Cal.4th 903, 907 [concerning § 1108].) We are bound by that ruling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

*Defendants Were not Prejudiced by the Instructional Error on Accomplice Testimony*

Defendants contend the court erred by failing to instruct the jury with CALCRIM No. 335 on the accomplice testimony given by Hernandez and Kyriakides. We apply a de novo standard of review to defendants' claim the court erred by failing to give a particular jury instruction. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

The court instructed the jury with CALCRIM No. 301 as follows: "Except for the testimony of Pedro Hernandez and Veronica Kyriakides, which requires supporting evidence, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."<sup>3</sup> The court also instructed the jurors that in evaluating a witness's testimony, they could consider whether the witness was "promised immunity or leniency in exchange for his or her testimony." (CALCRIM No. 226.)

After the jury retired for their deliberations, in the presence of defendants and all counsel, the court asked, "Did any counsel hear any mistakes that the court made in the reading of the jury instruction that you wish to point out to the court at this time?" All counsel replied, "No, Your Honor." The court then stated for the record: "We had a discussion regarding CALCRIM [No.] 301 and whether or not Veronica Kyriakides was in fact an accomplice as a matter of law. There was an argument to be made that she could have been a coconspirator. The court encouraged the prosecutor to just have the court instruct as a matter of law that she was an accomplice. The People had no objection to that and the defense had no objection to that." In other words, the parties agreed Kyriakides was an accomplice.

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The bench notes to CALCRIM No. 301 instruct the judge that, "if the jury must determine whether a witness is an accomplice," then the court must give CALCRIM No. 334. The court's error in this case might have been avoided if the bench notes to CALCRIM No. 301 had also stated that, if a witness is an accomplice as a matter of law, then the court must give CALCRIM No. 335.

Under Penal Code section 1111, a “conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.” Thus, Penal Code section 1111 “serves to ensure that a defendant will not be convicted solely upon the testimony of an accomplice because an accomplice is likely to have self-serving motives.” (*People v. Davis* (2005) 36 Cal.4th 510, 547 (*Davis*).) The theory is ““that accomplice testimony comes from a tainted source, is usually given in the hope or expectation of lenience or immunity, is untrustworthy, and should be viewed with caution.”” (*People v. Bowley* (1963) 59 Cal.2d 855, 858.)

“To corroborate the testimony of an accomplice, the prosecution must present ‘independent evidence,’ that is, evidence that ‘tends to connect the defendant with the crime charged’ without aid or assistance from the accomplice’s testimony.” (*People v. Avila* (2006) 38 Cal.4th 491, 562-563.) The requisite independent corroborating “evidence ““need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it *does not require interpretation and direction from the testimony of the accomplice* yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth . . . .””” (*Davis, supra*, 36 Cal.4th at p. 543.)

When ““there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices,’ including the need for corroboration.” (*People v. Tobias* (2001) 25 Cal.4th 327, 331; *People v. Guiuan* (1998) 18 Cal.4th 558, 566 [when accomplice is called solely by prosecution, court must instruct sua sponte that accomplice testimony should be viewed with distrust].)

CALCRIM No. 335 is the standard form instruction that informs the jury of the foregoing legal principles. Unfortunately, the court failed to perform its sua sponte

duty to charge the jury with CALCRIM No. 335. This was error because the court found Hernandez and Kyriakides were defendants' accomplices as a matter of law. Although the court instructed the jury that Hernandez's and Kyriakides' testimony required "supporting evidence," it failed to inform them of the requirements set forth in CALCRIM No. 335 for such supporting evidence. Thus, the jurors did *not* know that the "supporting evidence" had to (1) be believed by the jury, (2) be independent of the accomplice's testimony, (3) come from a source other than another accomplice, and (4) tend to connect defendants to the commission of the robberies, rather than simply show that a robbery was committed and the circumstances of its commission. (CALCRIM No. 335.) Nor did the court instruct the jurors that Hernandez and Kyriakides were accomplices to the robberies, and that an accomplice's testimony tending to incriminate a defendant must be viewed with caution. (CALCRIM No. 335.)

Relying on *People v. Sanders* (1995) 11 Cal.4th 475, 533, the Attorney General contends defendants waived the error by failing to object. *Sanders* stated: "Ordinarily, '[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (*Ibid.*) Here, however, the court failed to give the instruction that was correct in law and responsive to the evidence, i.e., CALCRIM No. 335. Had the court instructed the jury with CALCRIM No. 335 with no objection from defense counsel, then the Attorney General could viably argue on appeal that defendants waived any contention the instruction should have been clarified or amplified. But that did not happen here. The court gave only CALCRIM No. 301, which does *not* state the law on accomplice testimony and instead relates to the sufficiency of a single witness's testimony to prove a fact. Thus, *Sanders* does not support the conclusion defendants waived the instructional error. (See also *People v. Guiuan*, *supra*, 18 Cal.4th at p. 560 [absent objection, court not required sua sponte to *modify* instruction with regard to accomplice testimony potentially favorable to defendant].)

The error, however, was harmless. “‘A trial court’s failure to instruct on accomplice liability under [Penal Code] section 1111 is harmless if there is sufficient corroborating evidence in the record.’ [Citation.] ‘Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense.’ [Citation.] The evidence is ‘sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.’” (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 303.) This standard for “harmless error in the omission of accomplice instructions reflects the idea that sufficient corroboration allays the concerns regarding unreliability embodied in [Penal Code] section 1111. Thus, even in cases where the full complement of accomplice instructions . . . was erroneously omitted, [our Supreme Court has] found that sufficient corroborating evidence of the accomplice testimony rendered the omission harmless.” (*Gonzales*, at pp. 303-304.) Our Supreme Court has further “held that ‘even if there were insufficient corroboration, reversal is not required unless it is reasonably probable a result more favorable to the defendant would have been reached.’” (*Id.* at p. 304.)

Here, the court’s error was harmless because the record contains ample corroborating evidence that Burgin committed the Tustin and Laguna Beach robberies and Weick committed the Tustin robbery. This evidence includes defendants’ cell phone records; their assault on Perez; Andraos’s positive identification of Weick based on his cheekbones, nose, and ears; Burgin’s fingerprints and DNA on items in the abandoned Ford; Andraos’ silver coins found in Burgin’s home; the Tustin store address found in a navigational unit in Burgin’s car; and the hotel receipt and photograph showing Burgin stayed in a hotel with Castaneda on the night of the Laguna Beach robbery. Ample independent evidence sufficiently connected defendants with the robberies and supported a conclusion the accomplices were telling the truth.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.